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In the Supreme Court of the United States

OCTOBER TERM 1965

No. 813

ESTATE OF WALLACE P. GEIGER, Deceased,
WARREN G. DUNKLE, EXECUTOR, and
BURNICE I. GEIGER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To

The United States Court of Appeals
for the Eighth Circuit

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The Estate of Wallace P. Geiger, Deceased, Warren G. Dunkle, Executor, and Burnice I. Geiger, your petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on October 20, 1965.

OPINIONS BELOW

The opinion of The Tax Court of The United States is referred to as T. C. Memo 1964-153 (see Appendix

"A"). The United States Court of Appeals opinion, unreported as yet, is printed in full at Appendix "A".

JURISDICTION

The Judgment of the United States Court of Appeals sought to be reviewed was entered on October 20, 1965. The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1).

QUESTION PRESENTED

The sole question presented for review is whether the U. S. Court of Appeals for the Eighth Circuit erred in holding that the United States Supreme Court intended the rule in *James v. United States,* 366 U. S. 213 (May 15, 1961) to apply retrospectively, and that, therefore, money embezzled prior to James, in the years 1954 through 1959, both inclusive, qualified as income to the embezzler for federal income tax civil deficiency purposes under 26 U. S. C. Section 61 (a).

THE STATUTE INVOLVED

26 U. S. Code Section 61 (2) provides:

> Gross income defined
>
> (a) General definition.—Except as otherwise provided in this sub-title, gross income means income from whatever source derived, including:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

STATEMENT OF THE CASE

Wallace P. Geiger and Burnice I. Geiger, husband and wife, filed calendar year joint tax returns for the years 1954-1959, both inclusive. During these years Mr. Geiger owned and operated a hardware and seed business at Sheldon, Iowa, and Mrs. Geiger worked as Assistant Cashier for the Sheldon National Bank.

On January 16, 1961, examiners discovered that the books of the Sheldon National Bank did not balance. It was later determined by the Federal Deposit Insurance Corporation that the unbalance consisted of shortages in the amount of $2,175,000. Two weeks later a United States

Attorney's information was filed against Mrs. Geiger charging her in three counts with embezzlement of bank funds in 1960 in violation of 18 U. S. C. Sec. 656; in eight counts with causing false entries to be made in the bank's records during a period from 1957 through 1960, in violation of 18 U. S. C. Sec. 1005, and in 24 counts with wilfully misapplying funds of the bank in 1960 and 1961 by honoring checks drawn by persons with insufficient or no funds in violation of 18 U. S. C. Sec. 656. To this information she pleaded guilty and was sentenced to serve three consecutive 5-year sentences upon the embezzlement counts and concurrent sentences of five years each on the remaining 32 counts. Mrs. Geiger is now in prison.

Mrs. Geiger prepared the joint federal income tax returns for the years 1954-1959, both inclusive, and in those returns overstated sales by the seed company in amounts less than $20,000 per year. None of the embezzled money, other than the above overstatement, was reported as income in the years in issue.

On April 7, 1961, the Internal Revenue Service made jeopardy assessments against the taxpayers, and on June 1, 1961, notices of deficiency were mailed to them by the Commissioner of Internal Revenue. The taxpayers then petitioned the Tax Court of the United States for a redetermination of the deficiencies and penalties set forth in the notices of deficiency, and the Tax Court, upon taxpayers allegation as to date of mailing of notice of deficiency required by Rule 7 of the Rules of Practice of the Tax Court of the United States, took jurisdiction of the case.

The Tax Court held that the amounts of tax returned by the Geigers for the six years in question were deficient in the total amount of $183,734.34 (See Appendix A: T. C. Memo 1964-153). Taxpayers petitioned for and were granted a review of this decision by the U. S. Court of Appeals for the Eighth Circuit.

The Eighth Circuit Court of Appeals affirmed the Tax Court decision, holding that with respect to civil deficiencies the case of James v. United States applied retrospectively and that therefore funds embezzled during the years 1954-1959 were income to the petitioners under 26 USC 61 (a).

REASONS FOR ALLOWANCE OF WRIT

Petitioners contend that the United States Court of Appeals for the Eighth Circuit, hereafter referred to for convenience as the Circuit Court, erred in deciding a federal question in a way in conflict with the applicable decisions of this Court, and that the question decided is an important one which has not been, but should be decided by this Court. Specifically, petitioners contend that the Circuit Court erred in holding that the case of *James v. United States*, 366 U. S. 213 (1961) applies retrospectively, to require inclusion in gross income, under 26 U. S. C. 61 (a), funds embezzled during the years 1954-1959, both inclusive.

In rejecting Taxpayers' petition for review the Circuit Court predicted " . . . that a majority of the Supreme Court, as presently constituted would hold that embezzled

funds in the calendar years 1954-1959 constitute taxable income to the embezzler for civil non-fraud deficiency purposes when reliance on Wilcox is not a factor." (Circuit Court Opinion, page 43—Appendix A). Its premises were (1) that the James case applies retrospectively to civil tax deficiencies (2) unless the taxpayer can show reliance on *Commissioner v. Wilcox,* 327 U. S. 404 (1946).

The question of whether court decisions shall operate retrospectively has not been answered with uniformity. "The past cannot always be erased by a new judicial declaration." *Chicot County Drainage District v. Baxter State Bank,* 308 U. S. 371 at 374 (1940). This Court has held that a State can choose between the principle of forward operation and that of relation backward. And it has spoken against retrospective operation where injustice and hardship would result. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U. S. 358 (1932). Where retrospective application has been sought this court has believed it necessary to consider "particular relations . . . and particular conduct . . . rights claimed to have become vested, of status, of prior determinations deemed to have finality," and "public policy." *Chicot County Drainage Dist. v. Baxter State Bank,* supra, 308 U. S. at 374. In the absence of a uniform rule of retrospectivity this Court has held: "We think the Federal Constitution has no voice upon the subject." *Great Northern Ry. Co. v. Sunburst Oil and Refining Co.,* supra, 287 U. S. 358, at 364. More recently the Court has said: "However, we believe that the Constitution neither prohibits nor requires retrospective effect. *Linkletter v. Walker,* 85 S. Ct. 1731 (1965) at 1737.

In the instant case it does not appear that this Court intended the James decision to apply retrospectively. The language used looks not to the past but to the future.

> "We should *now* correct the error and the confusion resulting from it, certainly if we do so in a manner that will not prejudice those who might have relied on it. . . . We should not *continue* to confound confusion, particularly when the result would be to *perpetuate* the injustice. . . ." (Emphasis added.) *James v. United States, supra,* 366 U. S. 213 at 221.

Justice Black and Justice Douglas did not understand the rule as retrospective: "Thus, although it was not the law yesterday, it will be the law tomorrow that funds embezzled *hereafter* (emphasis added) are taxable income. . . ." *James v. United States,* supra, at 224. Nor were they convinced that civil cases should be viewed differently: "(The question of civil tax liability of past embezzlers is left equally unclear)."

Petitioners submit that the case controlling this issue is *Linkletter v. Walker,* U. S. 85 S. Ct. 1731 (1965). In that case this Court decided that *Mapp v. Ohio,* 367 U. S. 643, 81 S. Ct. 1684 (1961) did not apply retrospectively to cases finally decided before *Mapp.* It is important to note that the Court in *Linkletter* cited the *James* case as expressing two principles (1) that there is no distinction between civil and criminal litigation on the issue of retrospectivity, and (2) that *James* "laid down a prospective principle in overruling *Commissioner v. Wilcox,* 327 U. S. 404, 66 S. Ct. 546, 90 L. Ed. 752 (1946) 'in a manner that will not prejudice those who might have relied on it.'" *Linkletter v. Walker,* supra, 85 S. Ct. 1731 (1965), at 1737.

In *Linkletter* the reasons in favor of retrospectivity seem much more convincing than those of the Circuit Court in the case at bar. Linkletter was in prison, convicted upon evidence obtained in violation of his basic freedom against unlawful search and seizure under the Fourth Amendment. Yet this Court denied him retrospective application of *Mapp* because (1) the purpose of Mapp was to deter illegal police action, (2) wholesale release of victims would not advance that purpose, and (3) to make the rule of *Mapp* retrospective would tax the administration of justice to the utmost.

The purpose of *James* was to eliminate a rule of law which squarely held that embezzled funds were not included as gross income. The *James* decision was not a change in procedure but a change in substantive law. Where this Court denies retrospective application of a decision enlarging the procedural rights of citizens under the Fourth Amendment, it should not grant retrospective application of a decision which limits the substantive rights of citizens under a revenue statute.

The second premise upon which the Circuit Court denied taxpayers' petition was the question of reliance on *Wilcox*. Portions of Mrs. Geiger's deposition were quoted by the Circuit Court:

> "Mrs. Geiger in her deposition said that she had 'read that embezzled funds were not taxable in any way. In fact, I have heard several lawyers say that they were not taxable' ". (Circuit Court Opinion, footnote 6—Appendix A.)

Upon this statement the Court inferred that the only argument available to Mrs. Geiger was that in reliance

on existing law she did not set aside a reserve to pay taxes. It is noteworthy that the Court did not raise another possible inference: that Mrs. Geiger *did* understand that the funds were not taxable, based upon advice of counsel, and that accordingly she did not report the funds as income. The question is: What degree of proof is required to show reliance? Petitioners contend, in the absence of any proof of non-reliance, that Mrs. Geiger could not have done more than she did to show reliance on Wilcox.

Petitioners, in conclusion, urge that reliance on prior law (and in this instance a law which "The Treasury Department promptly accepted." *James v. United States,* supra, 366 U.S. 213 at 222), is only one of the factors to be considered in deciding whether an overruling decision shall apply retrospectively; that against the principle that everyone is presumed to know the law, it appears strange indeed to require proof, not only of knowledge, but of reliance upon that law.

CONCLUSION

The only issue in this case is whether or not the United States Court of Appeals for the Eighth Circuit erred in applying the case of *James v. United States,* 366 U.S. 213 (1961) retrospectively to require inclusion in gross income funds embezzled in the years 1954-1959.

Petitioners contend that the law in effect during the years 1954-1959 was *Commissioner v. Wilcox,* 327 U.S. 404 (1946); that Petitioners are entitled to the benefit of that law for the reasons stated herein, and that this Court

should grant Taxpayers' Petition for Writ of Certiorari.

Respectfully submitted,

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By Phillip Steve Dandos
One of said Attorneys.

PROOF OF SERVICE

I, Phillip Steve Dandos, one of the Attorneys for the Estate of Wallace P. Geiger, Deceased, Warren G. Dunkle, Executor, and Burnice I. Geiger, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9 day of December, 1965, I served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit upon respondent by depositing the same in a United States Post Office, with Air Mail Postage prepaid, addressed to:

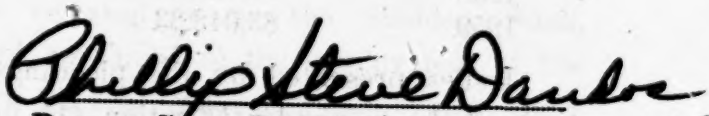
Mr. Thurgood Marshall
Solicitor General
Department of Justice
Washington 25, D. C. 20530

Sheldon S. Cohen
Commissioner of Internal Revenue
Fifteenth Street and Pennsylvania Avenue
Washington, D. C. 20220

as required by Rule 33 (2) of the Revised Rules of the Supreme Court of the United States, and to:

Mr. Mitchel Rogovin,
Chief Counsel, Internal Revenue Service
Washington, D. C. 20220

Mr. John B. Jones, Jr., Acting Assistant Attorney General
U. S. Department of Justice,
Constitution Avenue between Ninth & Tenth Sts.
Washington, D. C. 20530



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APPENDIX "A"

T. C. Memo 1964-153

TAX COURT OF THE UNITED STATES

ESTATE OF WALLACE P. GEIGER, DECEASED, WARREN G. DUNKLE, EXECUTOR, and BURNICE I. GEIGER, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 93982. Filed June 3, 1964.

Melford M. Lothrop, for the petitioners.
David A. Pierce, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WITHEY, *Judge*: The respondent has determined deficiencies in the income tax of petitioners and additions to tax under section 6653(b) of the Internal Revenue Code of 1954 for fraud for the following years and in the indicated amounts:

Year	Deficiency	Addition to tax Sec. 6653(b), I.R.C. 1954
1954	$76,101.94	$38,050.97
1955	79,429.54	39,714.77
1956	78,244.50	39,122.25
1957	79,457.99	39,728.99
1958	80,420.57	40,210.28
1959	83,042.23	41,521.12

Issues presented by the pleadings are the correctness of the respondent's action (1) in determining that in each of the years 1954 through 1959 the petitioners realized taxable income in the amount of $125,000 which was not reported in their income tax returns for the respective years, (2) in disallowing deductions taken by petitioner for medical expense for the years 1955 through 1959, (3) in determining additions to tax under section 6653(b) of the Code of 1954 for the years 1954 through 1959, and (4) in failing to determine that assessment of income tax for the years 1954 through 1956 is barred by the expiration of the period of limitations. The respondent has conceded error as to issue 3, which leaves issues 1, 2, and 4 for determination.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly.

Wallace P. Geiger and Burnice I. Geiger, husband and wife, resided in Sheldon, Iowa, during the years 1954 through 1959 and filed their joint Federal income tax returns for those years with the district director in Des Moines, Iowa.

Wallace P. Geiger died testate on July 23, 1961, and since July 31, 1961, Warren G. Dunkle has been the duly appointed and acting executor of his estate.

In the summer of 1921, when 18 or 19 years of age and after attending college for one year, Burnice I. Geiger, sometimes hereinafter referred to as the petitioner, was employed by Sheldon National Bank, sometimes hereinafter referred to as the Sheldon Bank, Sheldon, Iowa. She continued in the employment of the bank until January 16, 1961, when her employment there terminated. The petitioner's original employment at the bank was as bookkeeper. At that time she was without training as a bookkeeper and subsequently during her employment there she learned everything she knew about bookkeeping. Sometime in 1930 she was placed in charge of the bookkeeping department of the bank and at or about that time she also became assistant cashier of the bank.

During the period comprising approximately the last 30 years of her employment by Sheldon Bank, the petitioner pursued a course of conduct wherein she, without authorization of the bank and unlawfully, appropriated and converted money of the bank to her own use. Throughout such period of her employment by the bank, the petitioner appropriated and converted to her use in transactions on the Board of Trade an average of ap-

proximately $1,000 a month of the bank's money. In the same period of her employment by the bank she also appropriated and converted to her use in making loans and gifts to various individuals and firms undisclosed amounts of the bank's money.

The petitioner did not keep any book record of the bank's funds which she unlawfully appropriated and converted to her own use but did keep adding machine slips and written slips showing the amounts thereof.

Prior to January 16, 1961, a means employed by petitioner to conceal from bank examiners her unlawful appropriation and conversion of funds of the bank was the withdrawal by her from the files of the bank about the time she thought the examiners would come, ledger sheets of customers sufficient to make it appear that the records of the bank correctly reflected the bank's condition.

During the course of an examination of Sheldon Bank by Federal bank examiners, they, on January 16, 1961, discovered that the bank's books failed to balance. They asked petitioner to look for the shortage. She informed them that it would be of no use, that there was a shortage in the bank's funds and then told them what she had done. She spent the remainder of the day "setting up the books" of the bank for the Federal bank examiners so that they could ascertain exactly what she had done. With the exception of the president of Northern Biochemical Corporation, who was involved in the shortage of the bank's funds and who was convicted of a conspiracy with petitioner and is now serving a term in a

Federal penitentiary, the petitioner is the only one who was involved in and was responsible for the shortage in the funds of Sheldon Bank.

On the same day, January 16, 1961, the Federal Deposit Insurance Corporation took charge of the affairs of Sheldon Bank for the purpose of the liquidation thereof.

On January 30, 1961, the petitioner, in a criminal proceeding against her in the United States District Court for the Northern District of Iowa, Western Division, waived prosecution by indictment and consented that the proceeding might be by information. Thereupon there was filed an information wherein the petitioner was charged: (1) with 3 counts for embezzling and converting funds of Sheldon Bank in 1960, (2) with 8 counts for causing false entries to be made on the records of the bank during the years 1957 through 1960, and (3) with 24 counts for the willful honoring and payment of, or causing to be paid, during 1960 and 1961, checks drawn on the bank by parties who had no funds on deposit at the bank and checks drawn on the bank by other parties who had insufficient funds on deposit in the bank for making payment of such checks when presented. On the same day, January 30, 1961, the petitioner, appearing in person and by counsel of her own employment, entered a plea of guilty to all 35 counts of the information.

Thereafter, and on February 17, 1961, petitioner, appearing in person and by the same counsel, was sentenced to serve 5 years on each of the 3 counts for embezzlement, counts I, II, and III, with the sentences to

run consecutively, or a total of 15 years, and was sentenced to serve 5 years on each of the remaining 32 counts, with the sentences to run concurrently with the 5-year sentence imposed on count I. The petitioner is now serving the sentence at the Federal Reformatory for Women, Alderson, West Virginia.

There is no showing that the above-mentioned information containing 35 counts, comprising three groups or classifications of crimes, was intended to or did include all of the unlawful acts of the petitioner with respect to the affairs of Sheldon Bank during the period comprising approximately the last 30 years of her employment by it.

Beginning on September 5, 1947, and continuing thereafter until June 22, 1961, Wallace P. Geiger, petitioner's husband, owned and operated as his individual business a hardware and seed business in Sheldon, Iowa, under the name of O'Brien County Seed Company. He either turned over to petitioner or permitted her to have full charge of handling the financial matters relating to his hardware and seed business and relied on her for information as to the profits of the business.

The petitioner prepared the joint Federal income tax returns filed by her and her husband for the years in issue and in doing so she knowingly and intentionally overstated in the returns the actual amounts of the sales of his above-mentioned hardware and seed business. The amounts of such overstatements of gross income were as follows for the indicated years:

1954	$ 9,860.37	1957	$10,801.70
1955	17,129.74	1958	15,948.24
1956	19,472.49	1959	16,042.56

In the income tax returns for the foregoing years the income from the hardware and seed business was reported on an accrual basis and the salary received by petitioner from Sheldon Bank in such years was reported on the cash receipts basis.

The gross income reported by Wallace and petitioner in their joint Federal income tax returns for 1954, 1955, and 1956 was as follows:

	1954	1955	1956
Bank salary	$ 4,004.00	$ 4,279.00	$ 4,851.00
Dividends	1,043.40	1,238.99	1,746.52
Interest	43.96	17.79	33.17
Capital gain	1,617.04	———	———
Gross income from business of Wallace P. Geiger	89,994.64	101,557.20	86,733.03
Total reported	96,703.04	107,192.98	93,363.72
Less: overstatement in the returns of gross income from business	9,860.37	17,129.74	19,472.49
Corrected gross income reported	86,842.67	90,063.24	73,891.23

Wallace and petitioner timely filed their Federal joint income tax returns for 1954, 1955, and 1956 on or before April 15, 1955, April 15, 1956, and April 15, 1957, respectively, and on February 23 and February 24, 1961, executed a consent to the extension to June 30, 1962, of the period for assessment of income tax for the taxable year 1954 under section 6501(e) of the Code of 1954. The consent was executed by the respondent on February 28, 1961. Thereafter on April 7, 1961, the respondent made a jeopardy assessment of the deficiencies in issue and on

June 1, 1961, sent notices of his determination of such deficiencies.

In determining the deficiencies in issue the respondent increased the taxable income of Wallace and petitioner for each of the years 1954 through 1959 by an amount of $125,000 with the following explanation:

It is determined that you realized taxable income in the amount of $125,000.00 which was not included as income on your tax return. Accordingly, your taxable income is increased $125,000.00. The omission is computed as follows:

Total amount received		$2,174,799.90
Less: Net overdraft-Northern Biochemical Corp. for 1960 and January 1961	$1,094,798.07	
Other estimated shortages for 1960 and January 1961	80,001.83	$1,174,799.90
Shortage to December 31, 1959		$1,000,000.00
Shortage allocated per year for period 1952 through 1959		$ 125,000.00

OPINION

The first issue for determination is what amounts, if any, are to be included in the taxable income of Wallace P. Geiger and petitioner for the years 1954 through 1959 on account of the petitioner's unlawful appropriation and conversion to her use of money belonging to Sheldon Bank.

Pointing out that in *Commissioner v. Wilcox*, 327 U. S. 404 (1946), the Supreme Court held that embezzled money did not constitute taxable income to the embezzler in the year of embezzlement under section 22(a) of the

Internal Revenue Code of 1939, and recognizing that in *James v. United States,* 366 U. S. 213 (1961), the Court expressly overruled the *Wilcox* case, the petitioners contend that the rule of the *James* case is to be applied prospectively and not retroactively to cover the taxable years here in issue.

Since the filing of briefs herein, a contention like that made here by petitioners has been decided adversely to them in *Marvin E. Nerem,* 41 T. C. 338 (1963), on appeal (C. A. 8, March 9, 1964). In the *Nerem* case the taxpayer-husband, while employed as an assistant postmaster and during 1959 and 1960 when the decision of the Supreme Court in the *Wilcox* case was in effect, embezzled funds of the United States. There, as here, no question was involved as to liability for an addition to tax for fraud for failure to report the embezzled funds as income for the years in which received. In holding that the embezzled funds there involved constituted taxable income for the years in which received within the meaning of section 61(a) of the Code of 1954, we applied the principles of *Rutkin v. United States,* 343 U. S. 130 (1952), and *James v. United States, supra,* and pointed out: (1) that by reason of statutory provisions it has been a well-settled principle that an unlawful gain, as well as a lawful one, constitutes taxable income, (2) that the effect of a reversal by the Supreme Court of one of its prior decisions is not to make a new law but only to hold that the law always meant what the Court in its reversing decision says that it means, (3) that the Supreme Court in the *James* case, in reversing the criminal conviction of James, grounded its action on its belief that the element of willfulness could not be proven in a crim-

inal prosecution for failure to include embezzled funds in gross income in the year of misappropriation so long as the statute, section 22(a) of the Code of 1939, contained the gloss placed upon it by the *Wilcox* case at the time the alleged crime was committed, and (4) that in the *Nerem* case no "proof of willfulness • • • in a criminal prosecution" was involved but merely the deficiencies in taxes which the taxpayer and his wife reported on their joint income tax returns and that in a determination of such deficiencies, the elements of willfulness or nonwillfulness were not material factors. Finding nothing in the factual situation presented in the instant case to warrant otherwise, we are of the opinion and accordingly hold that our decision in the *Nerem* case is applicable and controlling here. Accordingly the *contention of the petitioners is not sustained.*

Having held as above, we now will consider an alternative contention of the petitioners that the only amounts, if any, of the shortages of Sheldon Bank which correctly can be included in the income of the petitioner for the years in issue as income of the petitioner is limited to the amounts she "received in *cash* or by *expenditures* made by the bank for her own use," which the petitioners state on brief were the following amounts for the indicated years:

Year	Amount includable as income of petitioner
1954	$12,249.88
1955	8,842.13
1956	5,632.89
1957	27,057.84
1958	18,682.27
1959	17,868.17
Total	$90,333.18

Respecting the inclusion in gross income of wrongful appropriations by a taxpayer, the Supreme Court in *James v. United States, supra,* said:

> When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, "he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." *North American Oil v. Burnet, supra,* at p. 424. In such case, the taxpayer has "actual command over the property taxed — the actual benefit for which the tax is paid," *Corliss v. Bowers, supra. This standard brings wrongful appropriations within the broad sweep of "gross income"; it excludes loans.* When a law-abiding taxpayer mistakenly receives income in one year, which receipt is assailed and found to be invalid in a subsequent year, the taxpayer must nonetheless report the amount as "gross income" in the year received. *United States v. Lewis, supra; Healy v. Commissioner, supra.* We do not believe that Congress intended to treat a law-breaking taxpayer differently. Just as the honest taxpayer may deduct any amount repaid in the year in which the repayment is made, the Government points out that, "if, when, and to the extent that the victim recovers back the misappropriated funds, there is of course a reduction in the embezzler's income." * * * (Emphasis added.)

In a deposition of petitioner taken after her incarceration, she testified to the effect that she kept no book record of the shortage in funds of Sheldon Bank but that she kept a slip of paper — an adding machine slip or a written slip — of each shortage so that she would know

what the shortage was and that she always kept an accurate account; that upon informing the Federal bank examiners of the shortage in the bank's funds on January 16, 1961, she spent the remainder of the day "setting up the books" of the bank for them so they could ascertain exactly what she had done; that most of the bank's shortage resulted from her cashing checks drawn on the bank by persons who did not have on deposit in the bank funds with which to pay the checks; that some of such checks were her own, some were her husband's, and the remainder were the checks of others; that as to the checks of such others which she cashed, all of the drawers thereof, except Northern Biochemical Corporation, considered that they were obtaining the money from her personally. The petitioner's testimony indicates that also included in the latter group were persons to whose accounts on the records of the bank the petitioner had credited as deposits sums of money when in fact the bank had received no money from those persons or from anyone else with respect to such credits. Although the petitioners have placed in the record other evidence to the effect that the petitioner "kept an accurate account of her defalcations for which she was responsible," and which evidence tends to support the testimony of the petitioner that she kept an accurate account of her appropriations and conversions of the bank's funds, the petitioners have not furnished us with a copy of such records as the petitioner may have kept or a copy of such writing as she may have made in "setting up the books" of the bank for the Federal bank examiners so that they could ascertain what she had done.

By stipulation the parties have placed in evidence Exhibit 9 which reads as follows:

> WHEREAS, The Sheldon National Bank of Sheldon, Iowa, has suspended operations and has been taken over under the provisions of Federal law by the Federal Deposit Insurance Corporation as Receiver thereof; and
>
> WHEREAS, Mrs. Burnice Geiger of Sheldon, Iowa, *did* while an officer of said The Sheldon National Bank of Sheldon, Iowa make certain *loans and gifts to various individuals* and firms from funds belonging to the said Bank; and
>
> WHEREAS, in *many cases,* the persons with whom such transactions were had may have been under the impression that the transactions were with the said Burnice Geiger personally and not with the said Bank; and
>
> WHEREAS, in *some* or *many cases* the said persons are reluctant to repay the consideration of such transactions to the Receiver of The Sheldon National Bank without a release of possible liability to the said Burnice Geiger.
>
> NOW, THEREFORE, in recognition of *her obligation* to said Bank and *the true state of the transactions,* the undersigned, Mrs. Burnice Geiger, hereby assigns and sets over unto the Receiver of said Bank, any and all right, title or interest that she may have in any of said transactions and hereby releases and exonerates any of the persons connected therewith from any obligation to her personally and requests that they pay the balance of any obligation which they may have to the Receiver of said bank. (Emphasis added.)
>
> EXECUTED at Sioux City, Iowa, this 16th day of February, 1961.

/s/ Burnice I. Geiger
Mrs. Burnice Geiger

WITNESSES:

/s/ Franklin E. Gill
/s/ Warren G. Dunkle

The witnesses to the petitioner's execution of the foregoing instrument had appeared as counsel for petitioner when on January 30, 1961, she entered a plea of guilty to the information. They also on February 17, 1961, appeared as her counsel when she was sentenced to prison. One of the foregoing counsel is involved in the instant case as executor of the estate of Wallace P. Geiger, one of the petitioners herein. The other counsel of petitioner is one of the counsel of the petitioners in the instant case and signed the petition here involved as well as the briefs of the petitioners. Under the foregoing circumstances it would appear highly improbable that petitioner's attorneys would have participated in her execution of the instrument of February 16, 1961, to the extent they did unless they were well aware that there was factual support for the recitals contained therein.

The above-quoted instrument executed by petitioner on February 16, 1961, recites, among other things, that petitioner while an officer of Sheldon Bank, made loans and gifts to "various individuals and firms" from funds belonging to the bank, that in "many cases" the persons with whom she had entered into such transactions may have been under the impression that the transactions were entered into with her personally, and that in "some or many cases" said persons are reluctant to repay the consideration of such transactions to the receiver of the

bank without a release of possible liability to the petitioner. In view of the fact that a period of 1 month had elapsed between the date on which the Federal Deposit Insurance Corporation took over the affairs of the bank, January 16, 1961, and the date on which the petitioner executed the above-quoted instrument, and in view of the preceding mentioned recitals contained in the instrument, it would appear likely that at the time the petitioner executed the instrument of February 16, 1961, the various individuals and firms referred to therein were not only well known to petitioner but were in all probability known to the receiver of the bank as well. However the petitioners have not informed us as to who the recipients of such loans and gifts were or as to the dates or the amounts thereof.

The parties by stipulation have placed in the record Exhibit 3 described as "a copy of the summary prepared by Federal Deposit Insurance Corporation auditors for The Sheldon National Bank, Sheldon, Iowa — In Receivership N. R. 261 — Shortage Account — Allocation of Shortages by Years and the unallocated shortages" and Exhibit 4 described as copies of "summary schedules of the allocations of shortages prepared by Federal Deposit Insurance Corporation auditors for The Sheldon National Bank, Sheldon, Iowa — In Receivership N. R. 261 — from which Exhibit 3 was prepared."

In Exhibit 3 the total shortage in the funds of Sheldon Bank is shown as $2,175,283.51, of which $464,874.91 is shown as unallocated shortage items and the remainder, $1,710,408.60, sometimes hereinafter referred to as allocated shortage, is shown as allocated to the fol-

lowing years in the indicated amounts which in turn were totals of amounts allocated to the indicated number of specified persons, firms, corporations, groups, etc.:

Year	Amount	Number of persons, firms, etc.
1941 and prior	$ 4,126.96	2
1946	1,800.00	1
1947	12.11	1
1948	6,939.94	5
1949	——	—
1950	30,208.65	5
1951	79,909.47	6
1952	38,779.79	4
1953	16,004.86	4
1954[1]	37,681.55	6
1955[1]	31,421.05	7
1956[1]	33,463.48	5
1957[1]	77,841.36	9
1958[1]	92,003.75	13
1959[1]	65,689.69	17
1960	1,083,127.08	24
1961	111,398.86	4
Total	$1,710,408.60	

[1]Taxable years in issue herein.

In stipulating Exhibits 3 and 4 in evidence the parties have not stipulated or agreed that the exhibits accurately or correctly reflect the factual situations as to the matters shown therein. Nor have the factual situations as to such matters been established otherwise by evidence. As a consequence the exhibits, for present purposes, do not constitute proof of the correctness of the items and amounts and the allocations thereof to the years and parties shown or set forth therein but merely constitute a reflection of the unsupported opinions and conclusions of

the persons who prepared the exhibits, namely, Federal Deposit Insurance Corporation auditors, none of whom appeared as a witness in the instant case. In this state of the record the exhibits are without probative effect as to the actual amount of the shortage in the funds of Sheldon Bank or as to the years and parties to whom the shortage, whatever may have been the correct amount thereof, was properly allocable. In this situation it follows that contentions and arguments predicated on the assumption that Exhibits 3 and 4 constitute proof of what is set forth therein are lacking in factual support. However, assuming that the exhibits constitute proof of the matters shown therein, we would be unable from a consideration thereof in connection with the remainder of the record and the various contentions and arguments made by petitioners to find that the petitioners have established that the only amounts of the shortage of Sheldon Bank which correctly can be included in the income of the petitioners as income of the petitioner for the years in issue were as stated by petitioners in their alternative contention.

In determining the deficiencies in issue the respondent determined the total shortage of Sheldon Bank as $2,174,799.90 or $483.61 less than the total shortage shown in Exhibit 3 discussed above. He determined that $1,174,799.90 or $19,726.04 less than the amount shown in Exhibit 3, of the shortage was allocable to 1960 and 1961, years subsequent to those here in issue, and that the remainder, $1,000,000 was allocable in equal amounts, $125,000, to each of the 8 years 1952 through 1959. He accordingly increased the taxable income of petitioners for each of the

years in issue by $125,000. His determination is presumed to be correct and the burden was on the petitioners to show that it was not. In our opinion the petitioners have failed to discharge their burden of proof. However, the respondent, for reasons not stated, has discharged part of such burden of the petitioners as a result of the following statement made by him in his opening brief:

Respondent concedes that the additional income, taxable to the petitioners, does not exceed the following:

	1954	1955	1956
Allocated Embezzlement (1)	$37,681.55	$31,421.05	$33,463.48
Unallocated Embezzlement (2)	15,495.91	15,495.91	15,495.91
Additional Gross Income	$53,177.46	$46,916.96	$48,959.39
Less: Embezzlement Already Reported (3)	9,860.37	17,129.74	19,472.49
Omitted Income	$43,317.09	$29,787.22	$29,486.90

	1957	1958	1959
Allocated Embezzlement (1)	$77,841.36	$92,003.75	$65,689.69
Unallocated Embezzlement (2)	15,495.91	15,495.91	15,495.91
Additional Gross Income	$93,337.27	$107,499.66	$81,185.60
Less: Embezzlement Already Reported (3)	10,801.70	15,948.24	16,142.56
Omitted Income	$82,535.57	$91,551.42	$65,043.04

(1) These amounts are the totals of the applicable columns of Exhibit 3. [Set out above.]

(2) These amounts are computed by dividing the unallocated shortage items of Exhibit 3 [$464,874.91] over a thirty-year period, the approximate period of the embezzlement.

(3) These amounts are determined by reference to the Amount of Overstatement of Exhibit 6. [Overstatements of income shown in returns of petitioners on account of overstatement by petitioner of sales of Wallace P. Geiger's hardware and seed business.]

The foregoing concession will be given effect in a recomputation of deficiencies.

The corrected gross income reported by the petitioners in their income tax returns for the taxable years 1954 through 1956 was as follows:

1954	$86,842.67
1955	90,063.24
1956	73,891.23

Gross income of petitioners for the taxable years 1954 through 1956 which was omitted from their income tax returns for such years was, in accordance with the respondent's concession, as follows:

1954	$43,317.09
1955	29,787.22
1956	29,486.90

Since the petitioners omitted from their gross income for each of the taxable years 1954 through 1956 an amount properly includable therein which is in excess of 25 percent of the amount of gross income stated in the return and since assessment of the deficiencies for such taxable years were made by respondent on April 7, 1961, which was within 6 years after the returns for such years were filed, the period of limitations for making assessment of the deficiencies had not expired at the time the defi-

ciencies were assessed. Section 6501(e)(1) of the Code of 1954.

In determining the deficiencies for the following years the respondent disallowed deductions of the indicated amounts taken by petitioners for medical expenses:

1955	$396.34
1956	277.51
1957	786.07
1958	680.50
1959	827.69

In their petition the petitioners assigned error as to the respondent's disallowance of the foregoing deductions and the respondent in his answer denied error. The petitioners have not submitted any evidence directed to this issue nor have they urged it either at the hearing or on brief. Accordingly we assume they have abandoned the issue and sustain the respondent's disallowance of the deductions.

Decision will be entered under Rule 50.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 17864

Petition for Review of a Decision of the Tax Court of the United States

Estate of Wallace P. Geiger, Deceased, Warren G. Dunkle, Executor, and Burnice I. Geiger,
Petitioners,

v.

Commissioner of Internal Revenue,
Respondent.

[October 20, 1965.]

Before BLACKMUN and RIDGE, Circuit Judges, and REGISTER, District Judge.

BLACKMUN, Circuit Judge.

The primary issue here is whether funds embezzled during the calendar years 1954-1959, inclusive, qualify as income for federal income tax civil deficiency purposes.

The taxpayers are Burnice I. Geiger and her husband, Wallace P. Geiger. They filed calendar year joint returns. Mr. Geiger died in 1961. The Tax Court held that the amounts of tax returned by the Geigers for the six years in question were deficient in the aggregate amount of $183,734.34.[1] The taxpayers petition for review. Judge Withey's opinion, not reviewed by the full court, is T. C. Memo 1964-153.

The background facts are not disputed. They are established by admissions in the pleadings and by stipulation.

Mrs. Geiger, when a young girl of 18 or 19 and after attending college for one year, was employed in 1921 by the Sheldon National Bank, Sheldon, Iowa, as a bookkeeper. She had no prior banking training. In 1930 she was placed in charge of the bank's bookkeeping department and became assistant cashier. She continued

1 The Commissioner has conceded that the Geigers are not liable for fraud additions he originally proposed under § 6653(b) of the Internal Revenue Code of 1954, 26 U.S.C. § 6653(b).

to work with the bank until January 16, 1961, a period of approximately 40 years.

During the last 30 years of her employment Mrs. Geiger without authority and unlawfully, as the Tax Court found, "appropriated and converted money of the bank to her own use". She used an average of about $1,000 a month for transactions on the "Board of Trade". She also effected transfers of funds to various individuals and firms, including herself, her husband and her husband's business. This was accomplished either by crediting the accounts of depositors without having received deposits from them or by honoring and then withholding checks drawn on the bank by persons who maintained insufficient balances or none at all. Mrs. Geiger concealed her conduct by pulling out ledger sheets for enough accounts to cover the existing shortage whenever bank examiners were expected. Apparently, except for Northern Biochemicals Corporation and its president, both of whom received diverted funds in 1960 and 1961 (years not at issue here), and except for herself and the Geiger accounts, those who were the beneficiaries of these manipulations thought they were the fortunate recipients of "loans and gifts" from Mrs. Geiger. According to figures prepared by the Federal Deposit Insurance Corporation, the total shortage occasioned by Mrs. Geiger's operations in this small bank over this lengthy period exceeded the almost unbelievable amount of $2,175,000.

From September 1947 until June 1961 Mr. Geiger had a hardware and seed business in Sheldon. His wife, however, had full charge of the financial aspects of this busi-

ness and he relied on her for information as to its profits.

Mrs. Geiger prepared the joint federal income tax returns for 1954-1959, inclusive, for herself and her husband. In those returns she knowingly overstated the seed company's sales in varying amounts less than $20,000 per year. Apart from this purposeful overstatement, no part of the funds she diverted from the bank was reported or mentioned in the Geigers' returns.

On January 16, 1961, examiners found that the bank's books did not balance. They asked Mrs. Geiger to look for the shortage. She informed them that this would be of no use and she then revealed what she had done. The FDIC forthwith took over the bank for liquidation.

Two weeks later an information was returned against Mrs. Geiger. This charged her, in three counts, with embezzlement of bank funds in 1960, in violation of 18 U.S.C. § 656; in eight counts, with causing false entries to be made in the bank's records at various times in 1957 to 1960, inclusive, in violation of 18 U.S.C. § 1005; and, in 24 counts, with willfully misapplying funds of the bank in 1960 and 1961 by honoring checks drawn by persons with insufficient or no funds, in violation of 18 U.S.C. § 656. She pleaded guilty to all 35 counts. Consecutive sentences of five years each on the three embezzlement counts and concurrent sentences of five years on each of the other 32 counts were imposed. She is now in prison.

Mrs. Geiger had no prior criminal record.

The issues here are (A) whether funds embezzled in 1954-1959, inclusive, constitute taxable income to the em-

bezzler under § 61(a) of the 1954 Code, 26 U.S.C. § 61(a);[2] (B) if so, whether the Tax Court correctly determined the amount of such income for the years in question; and (C) whether the period of limitations applicable to the Geigers' returns for 1954-1956, inclusive, is the usual three years prescribed by § 6501(a), or is the six years specified by § 6501(e) (1) (A) for a situation where more than 25% of gross income is omitted. The resolution of the last issue obviously turns on the answers to the first two.

A. *Embezzled funds.* On this issue the following chronology is significant:

1. In February 1946 *Commissioner v. Wilcox,* 327 U. S. 404, was decided.

2. In March 1952 *Rutkin v. United States,* 343 U.S. 130, was decided.

3. In 1954-1959, inclusive, those portions of Mrs. Geiger's embezzlements which now concern us were effected.

4. In May 1961 *James v. United States,* 366 U.S. 213, was decided.

Our task is to ascertain, from these three cases, the attitude and teaching of the Supreme Court, as presently constituted, as to the taxability of funds embezzled subsequent to *Rutkin* but prior to *James.*

It is of interest to note initially that the Income Tax Act of 1913, §II B, 38 Stat. 167, provided "That, subject

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2 § 61. Gross income defined
(a) General definition—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived.
. . .

only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from . . . the transaction of any lawful business carried on for gain or profit", and that the Revenue Act of 1916, § 2(a), 39 Stat. 757, reenacted this language except that it omitted the word "lawful". That statutory omission has continued to the present day. The omission would seem to imply a congressional intent to tax income unlawfully gained, as well as that honestly received and, indeed, the Supreme Court has so recognized. *James v. United States,* supra, p. 218 of 366 U.S. This determination, however, does not resolve the basic question whether a particular illegal receipt is "income" within the meaning and grasp of an income tax statute's catch-all section. That is our present problem.

In *Commissioner v. Wilcox,* supra, 327 U.S. 404 (1946), the Court for the first time was confronted with the question whether embezzled money constitutes taxable income to the embezzler.[3] The pertinent statute was § 22(a) of the 1939 Code. The tax year was 1941. Wilcox was a bookkeeper who had diverted collections belonging to his employer and lost most of them in gambling. The Supreme Court, by a 7 to 1 vote, with the majority opinion by Mr. Justice Murphy, held that embezzled funds were not income. It observed, pp. 407-08 of 327 U.S., that "mere dominion over money or property" is not decisive and that "no single, conclusive criterion has yet been

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3 The lower federal courts had been in conflict. This circuit was among those which had held that embezzled funds were taxable. Kurrle v. Helvering, 126 F. 2d 723 (8 Cir. 1942).

found to determine in all situations what is a sufficient gain to support the imposition of an income tax. . . . For present purposes, however, it is enough to note that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return. . . . Moral turpitude is not a touchstone of taxability". Mr. Justice Burton alone dissented. He found no "adequate basis for reading into the broad sweep of the [statute's] language the unexpressed limitation proposed in the majority opinion". He noted that the embezzler's complete possession of the funds and his use of them made them "of obvious economic value to" him; that the majority was reading into the statute an unjustified and sharp distinction between the embezzler and the defrauder; and that there was nothing in the Code which required an absence of an obligation to repay. Pp. 412-15 of 327 U.S. See also *United States v. Lewis*, 340 U.S. 590, 591-92 (1951).

In *Rutkin v. United States*, supra, 343 U.S. 130 (1952), the issue was the taxability of money obtained by extortion in 1943. This was a criminal case centering in willful evasion and § 145(b) of the 1939 Code but its resolution depended upon whether extortion money qualified as income under § 22(a). The Court, by a 5 to 4 vote, with the majority opinion written by Mr. Justice Burton, the sole dissenter in *Wilcox*, held that extorted funds were taxable income. It was observed that Rutkins' "control over the cash so received was such that, in the absence of . . . unlikely repudiation . . . petitioner could enjoy its use as fully as though his title to it were unassailable" and

that an unlawful gain was taxable "when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it". Pp. 136-37 of 343 U.S. The reconcilability of *Rutkin* with *Wilcox* was treated cursorily with the simple comment, p. 138, "We do not reach in this case the factual situation involved in *Commissioner v. Wilcox*. . . . We limit that case to its facts". Mr. Justice Black wrote the dissent. He and the three Justices who joined with him were the only ones remaining on the Court who had participated in the majority opinion in *Wilcox* six years before. The dissenters observed, pp. 139-40, that the extortionist was in no different a situation than the embezzler; that he is under a continuing obligation to return the funds; that the majority was adopting the reasoning of the dissent in *Wilcox;* and that this was largely "a consequence of a change in the Court's personnel".[4]

James v. United States, supra, 366 U.S. 213 (1961), like *Rutkin,* was a criminal case and concerned embezzlement during 1951-54, inclusive, and an alleged willful attempt to evade tax by failing to report the embezzled funds. Five separate opinions were written. None of these commanded

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4 The existence on the books of both Wilcox and Rutkin, without the overruling of the former by the latter, forced the lower federal courts then to engage in nimble and close distinctions or to accept different results for embezzlement on the one hand and extortion on the other. See J. J. Dix, Inc. v. Commissioner, 223 F. 2d 436 (2 Cir. 1955), cert. denied 350 U. S. 894. This court did not escape the difficulty. In Marienfeld v. United States, 214 F. 2d 632, 637 (8 Cir. 1954), cert. denied 348 U. S. 865, the majority, obviously with some pain, drew the line between the defendant's possession of an immediate or a deferred obligation to account for the funds. Judge Johnsen, in separately concurring, pp. 639-40, would not rest his decision on any such "narrow line of demarcation" but would predicate it "upon the simple and solid basis under the statute of actual economic gain, value and enjoyment having existed to the criminal". He felt that Kurrle v. Helvering, supra, was sound.

a majority. The Court, by a 6 to 3 vote, remanded the case with directions to dismiss, but by a like 6 to 3 vote (half of this majority were the dissenters as to the dismissal) overruled *Wilcox v. Commissioner*. Mr. Chief Justice Warren, joined by Justices Brennan and Stewart, observed that "Wilcox was thoroughly devitalized" by *Rutkin;* that both the extortionist and the embezzler obtain money by a criminal act, have no bona fide claim to it, and possess an obligation to repay; that Congress' purpose was to use the full measure of its taxing power; that *Wilcox* was wrongly decided; and that, p. 221,

> "we should now correct the error and the confusion resulting from it, certainly if we do so in a manner that will not prejudice those who might have relied on it. . . . We should not continue to confound confusion, particularly when the result would be to perpetuate the injustice of relieving embezzlers of the duty of paying income taxes on the money they enrich themselves with through theft while honest people pay their taxes on every conceivable type of income."

These three Justices, however, felt that the essential element of James' willfulness could not be proved "so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed". Mr. Justice Clark separately concurred, p. 241, in the overruling of *Wilcox* but would have affirmed the conviction, either because *Wilcox* had been overruled in the interim or because the proof showed conclusively that the defendant James placed no bona fide reliance on *Wilcox*. Mr. Justice Harlan, joined by Mr. Justice Frankfurter, concurred, pp. 241-48, in the overruling of *Wilcox* but, rather than reverse outright, would have remanded the case for

trial on the issue of James' reliance on the Wilcox doctrine. Mr. Justice Black, with Mr. Justice Douglas joining him, pp. 222-41, dissented from the overruling of *Wilcox*. They noted that not only was the criminal aspect of prior embezzlements left in confusion by the James decision but, p. 224, "The question of the civil tax liability of past embezzlers is left equally unclear". Mr. Justice Whittaker, joined by Justices Black and Douglas, pp. 248-58, gave emphasis on the Sixteenth Amendment in concluding that embezzled funds were not income, felt that *Wilcox* was rightly decided, and concurred in the reversal.

This case history and these several approaches in *James* provide the framework within which the first issue in the present case must be resolved. We note at this point that Justices Frankfurter and Whittaker, who sat on *James*, are no longer on the Court and that their seats are now occupied by Justices White and Fortas. The other seven Justices who spoke in *James* remain with us.[5]

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5 One might question, perhaps, whether all the acts of Mrs. Geiger constituted embezzlement, in the strict sense, see Moore v. United States, 160 U. S. 268, 269 (1895); Groves v. United States, 343 F. 2d 850, 854 (8 Cir. 1965), rather than some other variety of misappropriation. To the extent, if any, that we possibly are concerned here with non-embezzlement misappropriations, the issue of the retrospective effect of James in this civil deficiency suit is probably avoidable. This is so because Wilcox was regarded as a narrow exception to the general rule that unlawful gains, as well as lawful ones, are taxable. Cohen v. United States, 297 F. 2d 760, 769 (9 Cir. 1962), cert. denied 369 U. S. 865; Rutkin v. United States, supra, pp. 136-38 of 343 U. S.; James v. United States, supra, pp. 218-19 of 366 U. S. Accordingly, many courts have taken pains to inquire into the nature of the particular misappropriations and have reached conclusions that something other than embezzlement was present. The Wilcox-James problem, in one context or another, thus has been side-stepped. See, for example, United States v. Jannsen, 339 F. 2d 916, 918-19 (7 Cir. 1964); United States v. Goldberg, 330 F. 2d 30, 38-40 (3 Cir. 1964), cert. denied 377 U. S. 953; Federbush v. Commissioner, 325 F. 2d 1 (2 Cir. 1963). Compare United States v. Pitoscia, 238 F. Supp. 135 (D. N. J. 1965).

(Continued on page 40)

It seems certain to us, from the holding in *Rutkin* and from the language of the several opinions in *James* and the implications which flow therefrom, that a majority of the Supreme Court, as presently constituted, would hold that funds embezzled in the calendar years 1954-59 constitute taxable income to the embezzler for civil non-fraud deficiency purposes where reliance on *Wilcox* is not a factor. Clearly, Mr. Justice Clark would so hold, for he was among the majority in *Rutkin* and would have affirmed the conviction of *James*. Clearly, Mr. Justice Harlan would so hold, for he would have affirmed the conviction of *James* in the absence of reliance on *Wilcox*, and went so far as to observe, p. 244 of 366 U.S., "I take it that our decisions in the tax and any other field for that matter *relate back* to the actual transactions with which they are concerned". And it seems clear, too, that the Chief Justice and Justices Brennan and Stewart, who joined him in *James*, should so hold, for their emphasis, p. 220, was on "re-examining and correcting the Court's own errors", despite congressional inaction during the interim since *Wilcox*. Their concern was the avoidance

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(Continued from page 39)

We do not indulge in any such analysis and identification of the misappropriations in the present case. We are content, instead, to give the Geigers the "benefit" of any doubt and to make the assumption that her defalcations were embezzlements. We do so for three reasons: First, Mrs. Geiger's plea of guilty, so far as the first three counts of the information are concerned, was to specific charges of embezzlement, albeit in 1960. Second, the Commissioner in his Tax Court answer alleged fraud and stated, among other things, "During the period of her employment by the Sheldon National Bank, petitioner Burnice I. Geiger embezzled for her own use funds belonging to said bank in the amount of at least $2,174,799.90". The Geigers, by their reply, admitted that Mrs. Geiger, during the period of her employment by the bank, "embezzled for her own use funds belonging to said bank". Third, the Commissioner has not suggested to us that the 1954-59 misappropriations were not embezzlements.

of possible prejudice to "those who might have relied on" *Wilcox*; that concern found expression with respect to the willfulness factor of the crime with which James was charged. But willfulness and prejudice are not factors on the civil side of tax liability (at least in the context of embezzled funds) apart, of course, from any fraud penalty which is not now in the present case.[6] Perhaps Justices Black and Douglas, because of their continued adherence to *Wilcox,* would vote otherwise unless they were to conclude that, although in disagreement, they were bound by the recent precedent of *James.* But this is not certain, for their opinion, p. 225, refers to "the fact that [the Court's] judgments could not be limited to prospective application". Naturally we cannot speculate as to the attitude of Justices White and Fortas for neither participated in *James.*

The Geigers argue that *James,* in deciding that embezzled funds are income, was intended to be only prospectively applied; that it thus does not govern their tax years 1954-59, when *Wilcox* was still the stated law; and that a contrary holding is inequitable because embezzlers of 1953 and prior years were not taxed on their embezzlements. They rest this argument on the use in the Chief

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6 Mrs. Geiger in her deposition said that she had "read that embezzled funds were not taxable in any way. In fact, "I have heard several lawyers say that they were not taxable". It is not contended, however, that she would not have embezzled had she thought the proceeds were taxable. The only argument seemingly available to her, based upon prejudicial reliance—and it is not one advanced to us—would be that, in such reliance as to then existing law, she had disposed of the bulk of her proceeds without setting aside a reserve to pay taxes. This kind of thing, however, has not prevented retrospective application of changed interpretations in the civil aspects of tax law. See, for example, Helvering v. Hallock, 309 U. S. 106, 119 (1940).

Justice's opinion, p. 221, quoted above, of words of present correction ("we should *now* correct"; "We should not *continue* to confound . . . when the result would be to *perpetuate*" [emphasis supplied by the Geigers]), and on comments in the Black-Douglas opinion, pp. 223-24, and 230 ("dissent . . . from the *prospective* way" in which the overruling of *Wilcox* is done; "*it will be* the law *tomorrow*"; and "*Were it not for the novel formula of applying the Court's new law prospectively*" [emphasis similarly supplied]).

We are not persuaded by this argument. We repeat our observation that the Chief Justice's opinion is directed to the correction of "the Court's own errors". It is true that he and those joining with him concluded that, in view of the presence of *Wilcox* since 1946, no past willfulness in evasion could be proved against James and thus the James decision in their minds, as a matter of practicality, could be only prospective in application to a crime of tax evasion of which willfulness is a part. This, however, does not prevent the application of *James* to a situation where willfulness is not a factor. The civil non-fraud tax liability of the Geigers is such a situation. We also read the comments of Mr. Justice Black, not in terms of restricted, prospective application of *James,* but in terms of criticism of results flowing from the *Wilcox-Rutkin-James* chronology. Here, too, his targets are the willfulness feature of the crime of evasion and the Chief Justice's conclusion that it can be only prospectively applied.

Our duty is to follow the Supreme Court decisions and their implications as we see them. In view of the analysis

we have made, we must hold that funds embezzled in the calendar years 1954-59, inclusive, are income to the embezzler. We thus decide the first issue against the Geigers. We add, for what it might be worth, that, were this a matter of first impression for the present panel, we, too, would reach this conclusion independently, for we are in agreement with the 1942 decision of this court in *Kurrle v. Helvering,* 126 F.2d 723, and with the reasoning of Judge Johnsen, concurring in *Marienfeld v. United States,* 214 F.2d 632, 639-40 (8 Cir. 1954), cert. denied 348 U.S. 865.

As an addendum we observe that those cases since *James* which appear to have to do with embezzlement and which concern either expressly or, by necessary implication, the retrospective effect of *James* in a civil deficiency suit all support the Commissioner's position on this appeal. The only decisions we have found which squarely hold that *James* applies to antecedent embezzlement are *Marvin E. Nerem,* 41 T.C. 338 (1963), petition for review by Eighth Circuit dismissed for want of jurisdiction; *William G. Hackney*; T.C. Memo 1965-127; and *Newell W. Emerson,* T.C. Memo 1965-185. Like results, however, have been reached without specific discussion of the retrospective feature in *Estate of Adame v. Commissioner,* 320 F.2d 811, 814 (5 Cir. 1963) (as to the 1953 deficiency there at issue); *Stoller v. United States,* 320 F.2d 340, 344 (Ct. Cl. 1963); and *L. M. Muldrow,* 38 T.C. 907, 912 (1962). See *Leaf v. Commissioner,* 295 F.2d 503 (6 Cir. 1961), affirming 33 T.C. 1093. Dicta to the same effect are present in *Sowell v. Commissioner,* 302 F.2d 177, 181 (5 Cir. 1962); *Donohue v. Commissioner,* 323 F.2d 651, 652

(7 Cir. 1963), cert. denied 376 U. S. 911; and *United States v. Goldberg,* 330 F.2d 30, 39 (3 Cir. 1964), cert. denied 377 U. S. 953.

B. *The omitted income computations.* Except for minor adjustments not here in issue, the deficiencies initially proposed by the Commissioner in the Geigers' federal income taxes for 1954-59, inclusive, were attributed to his allocating an even $1,000,000 of the entire bank shortage of approximately $2,175,000 to the eight years from 1952-59, inclusive; his spreading this million evenly over those eight years; his consequent assignment of $125,000 as income to each of the six taxable years 1954-59 which he felt were then still open; and his allocating the entire remainder of the bank's shortage to 1960 and 1961. During the trial, however, the Commissioner, deferring to computations prepared by the FDIC, conceded that the includible amounts, after credit for the sales overstatements for Mr. Geiger's business, did not exceed specified lesser figures. The reduced amount of omitted income for each year was based upon (a) FDIC identified shortages for the year, and (b) a one-thirtieth share of an aggregate of unidentified shortages for the entire 30 year period. These unidentified items totaled $464,874.91; each year's share was therefore computed at $15,495.

The FDIC computations were in the form of exhibits placed in evidence by stipulation. The Tax Court, because the parties did not expressly stipulate that these exhibits correctly reflected the fact situation, and because it felt that that situation was not otherwise established by evidence, stated that the exhibits "do not constitute proof of

the correctness of the items", and that they "are without probative effect as to the actual amount of the shortage in the funds of Sheldon Bank or as to the years and parties to whom the shortage, whatever may have been the correct amount thereof, was properly allocable". (Both parties here disagree with this statement; however, the taxpayers, it seems to us, attack the statement for certain purposes and accept it for others). Judge Withey concluded that he was unable, in any event, to find that the taxpayers had established that their own proposed alternative lower figures were proper and to be employed. He held that the Commissioner's initial determination was presumed to be correct, that the burden was on the taxpayers to show that it was not, that this burden had not been discharged, and that the Commissioner's concession as to reduced amounts, however, was to be given effect in a recomputation of deficiencies. The Court's ensuing decision was computed accordingly.

The taxpayers attack the omitted income figures (that is, both the $1,000,000 and the $464,874.91 unallocated shortage) in what are, essentially, three respects. It is asserted that these figures are erroneous because they fail to adjust for the following:

1. A bank shortage of $75,000 already in existence when Mrs. Geiger began her employment in 1921. The only evidence as to such a shortage at that time consists of Mrs. Geiger's own statement made by deposition and in general terms. The taxpayers also emphasize the fact that the United States attorney, at the imposition of sentence in the criminal proceeding, stated that Mrs. Geiger "discovered that the bank records were being manipulated

to conceal a shortage of approximately $75,000 which then existed".

We are not inclined, first of all, to draw any estoppel against the Commissioner in the United States attorney's reference. This was a mere recognition of Mrs. Geiger's position and seems to be nothing more than a kind attempt, at the time of the sentencing, to suggest a background reason for her later misappropriations. See, generally, as to estoppel against tax authorities, 10 Mertens, Law of Federal Income Taxation, §§ 60.14-15. Furthermore, the taxpayers made no move otherwise to prove the existence of a preexisting shortage, or that it was on the books of the bank when the FDIC made its examination, or that it continued to exist throughout the entire 30 year period. The Tax Court was not required to accept Mrs. Geiger's bare statement. *Kann v. Commissioner*, 210 F.2d 247, 250-51 (3 Cir. 1953), cert. denied 347 U.S. 967; *Rand v. Helvering*, 77 F.2d 450, 451 (8 Cir. 1935); *Banks v. United States*, 322 F.2d 530, 537 (8 Cir. 1963). Finally, we feel that the FDIC exhibits did have some probative value and that Judge Withey's characterization of them as "without probative effect" was directed only to their worth in fixing actual and specific amounts of shortage. The exhibits, in fact, were admitted into evidence.

2. Mrs. Geiger's loss of an average of $1,000 per month for 30 years, a total of $360,000, on the Board of Trade. The Tax Court found that Mrs. Geiger, during the period of her employment by the bank, "appropriated and converted to her use in transactions on the Board of Trade an average of approximately $1,000 a month of the bank's money". It is to be observed that the Tax Court did not

find that the $1,000 per month was lost. It found only that Mrs. Geiger appropriated that amount for use in Board transactions. This, it seems to us, is fatal to the taxpayers' argument. Use does not equate with loss.

Here again the only evidence that these amounts were lost was Mrs. Geiger's own generalized statement to this effect. We have noted above that the Tax Court was not required to accept her testimony. No Board records were produced to establish the taxpayers' contentions. No losses of this kind were reported in their returns as filed although the returns for 1954, 1957 and 1959 did reflect capital transactions. Finally, the taxpayers' suggestion that, because of these losses, $12,000 is deductible annually, under § 165(c)(1) or (2), in the computation of net income, a contention raised for the first time on appeal, overlooks the fact that any loss of this kind would qualify as one sustained on disposition of a capital asset, under §§ 1221 and 165(f) of the 1954 Code, *Commissioner v. Covington,* 120 F.2d 768, 770 (5 Cir. 1941), cert. denied 315 U.S. 822; *Estate of Smith v. Commissioner,* 313 F.2d 724, 736 (8 Cir. 1963); 3B Mertens, Laws of Federal Income Taxation, § 22.14, p. 72, and would be limited to the extent allowed by §§ 1211 and 1212. These limitations would reduce any deduction otherwise available to a small amount compared with the asserted claim for $12,000 annually.

3. Amounts which the taxpayers claim cannot properly be regarded as income to Mrs. Geiger. These are:

a. The sum of $7,542.77 which remained in Mrs. Geiger's personal accounts with the bank on January 16, 1961.

b. The sum of $29,592.26 which remained in the bank in accounts for Mr. Geiger and his business on January 16, 1961.

c. Improper credits to the accounts of depositors, other than the Geigers and the business, which exceeded any repayments to Mrs. Geiger.

d. Checks drawn by such persons and withheld by Mrs. Geiger from charging and cancellation.

The effect of this would be that only the following shortage items are includable in Mrs. Geiger's income:

a. Checks drawn by Mrs. Geiger on her personal checking account and withheld from charging and cancellation.

b. Improper credits to her accounts to the extent that, in the aggregate, they exceed the balances in those accounts on January 16, 1961.

c. Checks drawn on the business account the proceeds of which went for the personal use and benefit of Mrs. Geiger, less replacement deposits made in that account.

d. Amounts returned to Mrs. Geiger by beneficiaries of improper credits.

It seems to us that the taxpayers' argument that the first group of items above described cannot properly be regarded as income to Mrs. Geiger raises two questions: (a) Did her improper and purposeful crediting of a Geiger account effect, in and of itself, the realization of income taxable to her? (b) Did her improper and purposeful honoring of a check or crediting of a bank account of another result in income to her?

The taxpayers contend that Mrs. Geiger's crediting of an account "did not change the amounts of money, funds or credits owned by the bank"; that at that point she did

not take anything of value belonging to the bank; and that the bank's funds were involved only when the check was presented for payment and was honored and paid.

We nevertheless answer the first question adversely to the taxpayers. Income, for a cash basis taxpayer, is not restricted to cold cash in a taxpayer's fist. Income may be constructively received. *Helvering v. Horst,* 311 U.S. 112, 115 (1940). It has long been recognized, for example, that the crediting of interest to one's savings account, or the maturing of a bond coupon without, in the one case, withdrawal or, in the other, deposit or cashing, is income. 2 Mertens, Law of Federal Income Taxation, § 10.12, pp. 37, 39; Treas. Reg. § 1.451-2(a) and (b), including the amendment effected by T.D. 6723, 1964-1 C.B. 73. Although these examples are not precise parallels, it follows, we think, that, as to the improper credits Mrs. Geiger effected for her own accounts, income was forthwith realized, despite the fact that there was no immediate withdrawal or that there were balances remaining when her defalcations were uncovered in 1961. The key fact is control or, as we have noted above as to the embezzlement issue, readily realizable economic benefit derived therefrom as a practical matter. *Rutkin v. United States,* supra, p. 137 of 343 U.S. That the funds happened to remain for the time being in the bank as such is not material.

This approach answers the argument that the 1961 balances in the several Geiger accounts are to be used in reduction of taxable income. Their absorption in 1961, when the bank was taken over, might well qualify them as deductions for that year, *James v. United States,* supra, p. 220 of 366 U.S.; and see § 1341 of the 1954 Code; but

this fact does not disturb the income character of the improper credits at the time they were effected. *James v. United States,* supra, pp. 219-20 of 366 U.S.; *Rutkin v. United States,* supra, p. 137 of 343 U.S.; *Dawkins v. Commissioner,* 238 F.2d 174, 179 (8 Cir. 1956).

In turning to the second question, involving, in the aggregate, sums less than those diverted to Geiger accounts, we find nothing persuasive in the fact that other persons were the recipients of the "loans and gifts". The taxpayers' position in effect is that, technically, these funds flowed direct from the bank to the outside beneficiaries and did not pass through Geiger hands. That may be one way to describe it. Another, equally valid, is that the funds came to Mrs. Geiger and were passed out or made available by her to the beneficiaries. These beneficiaries were the objects of her bounty, not the bank's. She was the force and the fulcrum which made those benefits possible. She assumed unto herself actual command over the funds. This is enough. *Corliss v. Bowers,* 281 U.S. 376, 378 (1930). We are not sympathetic with the claim that, because she may not have used the funds for personal needs, she is not to be taxed. She enjoyed benefits of a kind which obviously must have loomed large in her mind and have been important to her—status as the beneficent donor to good causes and favored acquaintances, a reputation as an available friend in need, the acquisition, with respect to a "loan", of the resulting obligation to her, and the like. *Helvering v. Horst,* supra, pp. 116-17 of 311 U.S. It would be ironical to hold otherwise.

Of no legal significance in the Geigers' tax picture is the fact that the bank possessed a right to recover from

beneficiaries the improper credits or payments made for or to them. This same feature characterizes other misappropriations and illegal gains and does not disqualify them as taxable income. *Rutkin v. United States,* supra, p. 137 of 343 U.S.; *James v. United States,* supra, p. 216 of 366 U.S.

We therefore decide all aspects of this computational issue against the taxpayers.

C. *The years 1954-56 and the limitations period.* Section 6501(e) (1) (A) is not a penalty statute. It stands in contrast, for example, to § 6653 which imposes penalties for underpayment due to negligence, and for fraud. Section 6501(e) (1) (A) merely provides a longer period in which a deficiency assessment may be made whenever there is an omission of more than 25% of gross income stated in the return. Such is the situation here for the Geigers' taxable years 1954-56, inclusive. Those years thus remained open and deficiencies, when assessed in early April 1961, were not barred. It provides small comfort to the taxpayers, of course, but one may note that deficiencies due to like misappropriations in the years prior to 1954 are in fact barred.

We find no error in the deficiencies as determined by the Tax Court.

Afiirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17,864. September Term, 1965.

(Filed Oct. 20, 1965, Robert C. Tucker, Clerk.)

Petition for Review of Decision of the Tax Court of the United States.

Estate of Wallace P. Geiger, Deceased, Warren G. Dunkle, Executor, and Burnice I. Geiger,

Petitioners,

vs.

Commissioner of Internal Revenue.

This cause came on to be heard on the Petition to review the Decision of the Tax Court of the United States entered August 18th, 1964, determining that there are deficiencies in the income taxes of the petitioners for the calendar years 1954 to 1959, inclusive, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Decision of the said Tax Court of the United States in this cause be, and the same is hereby affirmed.

And it is further Ordered by this Court that the petition for review in this cause be, and the same is hereby dismissed.

October, 1965.

Order entered in accordance with Opinion:

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.